Filed 2/16/05 In re Northridge Earthquake Litigation CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

IN RE NORTHRIDGE EARTHQUAKE LITIGATION HAROUTIOUN KELAYEJIAN, et al., Plaintiffs and Appellants, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	B170926 (Los Angeles County Super. Ct. No. EC033408)

APPEAL from the judgment of the Superior Court of Los Angeles County. Anthony J. Mohr, Judge. Affirmed.

Leland L. Whitney for Plaintiffs and Appellants.

Luce, Forward, Hamilton & Scripps, Peter H. Klee and Seth M. Friedman for Defendant and Respondent.

The 1994 Northridge earthquake damaged Haroutioun and Tina Kelayejian's Glendale property. Dissatisfied with how their property casualty insurer, Allstate Insurance Company, was handling their claim, the Kelayejians filed a complaint in July 1996 against Allstate for breach of contract, negligence, and misrepresentation. In October 1996, they dismissed their complaint *with* prejudice.[1]

In 2000, the Legislature enacted Code of Civil Procedure section 340.9.[2] The statute revived under certain circumstances claims against insurers by owners of property damaged in the Northridge earthquake. Subdivision (a) of the statute provided, "Notwithstanding any other provision of law or contract, any insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of [January 1, 2001] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of [January 1, 2001] . . . ." Section 340.9 did not revive a time-barred claim, however, if the policy holder had "litigated to finality" its claim against its insurer. (§ 340.9, subd. (d) [statute "shall not apply to . . . . [¶] Any claim that has been litigated to finality in any court of competent jurisdiction . . . ."].)

In December 2001, the Kelayejians filed a new complaint against Allstate for breach of contract. Allstate demurred to the complaint. It argued the Kelayejians could not state a cause of action because five years earlier they had dismissed their complaint for the same earthquake damage with prejudice.[3] According to Allstate, the Kelayejians'

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[1] The Kelayejians' brief mentions in passing and without citation to any supporting evidence that their then-attorney filed the dismissal without their permission.

[2] All further section references are to the Code of Civil Procedure unless otherwise indicated.

[3] The complaint also alleged causes of action for negligence and violation of section 340.9, but the trial court sustained Allstate's demurrers to those causes of action. The Kelayejians do not challenge those rulings.

new complaint was therefore barred under the doctrine of res judicata, and section 340.9 did not revive it because they had "litigated [it] to finality" when they dismissed their first complaint with prejudice.

The court overruled the demurrer. It noted that ordinarily a dismissal with prejudice is res judicata, but here the court understood section 340.9's term "litigated to finality" to mean disposition of a claim by a court ruling or jury verdict.[4] Reasoning that a voluntary dismissal is not "litigated to finality," the court concluded section 340.9 revived the Kelayejians' claim even though they had previously dismissed it with prejudice.

For reasons unrelated to this appeal, the Kelayejians' lawsuit was transferred to another trial court. Allstate thereafter moved for summary judgment. It noted that section 340.9 stripped insurers of only the statute of limitations defense to Northridge earthquake claims, leaving all other defenses available. (*Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 82; *Hellinger v. Farmers Group, Inc.* (2001) 91 Cal.App.4th 1049, 1065.) Allstate argued the Kelayjians' voluntary dismissal with prejudice in 1996 was a retraxit, which barred filing another complaint against the same party for the same events. The court agreed. It found section 340.9 denied Allstate only a statute of limitations defense to lawsuits arising from the Northridge earthquake, but did not deny insurers any other defense. Accordingly, the Kelayejians' voluntary dismissal with prejudice of their first lawsuit barred filing a second lawsuit against Allstate. The court entered judgment for Allstate and this appeal followed.

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4 Although the parties and the trial court refer to the dismissal's effect as "res judicata," we believe the more precise term is "retraxit," an arguably outdated word supplanted by "res judicata." Because res judicata invokes circumstances not present here, such as a final judgment *on the merits*, we use the term res judicata only because the parties and trial court did. Whatever term we and the parties use, however, all agree this appeal turns on whether the Kelayejians' dismissal of their first complaint terminated their claims against Allstate.

DISCUSSION

It has been settled for decades that a voluntary dismissal of a complaint with prejudice prohibits filing a second complaint against the same defendant for the same events. (*Johnson v. Count of Fresno* (2003) 111 Cal.App.4th 1087, 1095 ["A dismissal with prejudice bars a subsequent action on the same claim between the parties and their privies."]; *Rice v. Crow* (2000) 81 Cal.App.4th 725, 733 ["A dismissal with prejudice is the modern name for a common law retraxit. . . . A retraxit is a judgment on the merits preventing a subsequent action on the dismissed claim."]; *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1198 ["A dismissal with prejudice 'is equivalent to a judgment on the merits and as such bars further litigation on the same subject matter between the parties.' "]; *Wouldridge v. Burns* (1968) 265 Cal.App.2d 82, 85 ["A dismissal with prejudice of an action is a bar to the bringing of the same cause of action thereafter, and precludes the plaintiff from litigating that issue again. [Citation.] Otherwise there would be no meaning to the 'with prejudice' feature."].) We find the trial court properly applied that well-settled principle to dismiss the complaint here.

The Kelayejians contend it is irrelevant that their dismissal was with prejudice because, they seem to argue, the words "with prejudice" are of no import. In support, they cite *Goddard v. Security Title Ins.* (1939) 14 Cal.2d 47 (*Goddard*). In that case, the trial court sustained a demurrer to a complaint based on the complaint's technical, non-substantive defects and dismissed the complaint with prejudice. On appeal, the Supreme Court held dismissal with prejudice was improper after a demurrer asserting technical defects. The proper disposition, according to the Supreme Court, was dismissal without prejudice. In explaining its holding, the Supreme Court stated the following, which the Kelayejians allude to and portions of which they quote: " '[A]dd[ing] the words "with prejudice" to [an] order of dismissal . . . if it has any definite meaning, suggests merely that the court believed that the judgment would finally conclude the controversy. But it is the nature of the action and the character of the judgment that determines whether it is res

judicata. . . . The words "with prejudice" add nothing to the effect of the judgment in such a case, no matter what light they throw on the intention of the court. [¶] . . . [¶] . . . If the trial court has no authority to add the term "with prejudice" to a judgment not on the merits, it necessarily follows that the unauthorized addition of this term cannot so radically change the effect of the judgment as to make it a bar even though it is not on the merits.' " (*Id*. at pp. 54-55.)

The Kelayejians place great weight on the foregoing passage in *Goddard*, even though they concede it is distinguishable from their case because it involved a demurrer, not a voluntary dismissal. They contend sound jurisprudence requires that the term "with prejudice" have only one meaning in all Supreme Court decisions, regardless of the legal issue involved, and, the Kelayejians apparently believe, *Goddard* defines "with prejudice" as meaningless. In support of their argument for uniform interpretation of a phrase across all bodies of law, they cite *In re Marriage of Brown* (1976) 15 Cal.3d 838, a case involving a divorced-wife's entitlement to her ex-husband's unvested pension benefits. *Brown* stands for exactly the opposite, however, for it recognized that words such as "vested" can in certain legal areas acquire special meanings—contrary to the Kelayejians' theory of uniform interpretation and sound jurisprudence. (*Id*. at p. 42.)

The Kelayejians further contend that even if "with prejudice" means something, a dismissal without prejudice is not res judicata unless they received consideration for their dismissal. They concede *Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, holds otherwise, but ask that we disregard that decision. In *Roybal*, the plaintiff filed a complaint in municipal court followed by a complaint based on the same events in superior court. (*Id.* at p. 1083.) Without receiving any consideration, the plaintiff later dismissed the municipal court complaint with prejudice. (*Id*. at pp. 1083, 1086.) The defendant thereafter successfully moved for dismissal of the superior court action, arguing the dismissal of the municipal court action was a retraxit. The appellate court agreed. It found a dismissal with prejudice barred further complaints involving the same

events even if the plaintiff received no consideration for the dismissal. (*Id*. at pp. 1085-1086.)

The Kelayejians attack *Roybal* on several grounds. First, they argue it is an aberrant decision outside the legal mainstream. They are mistaken. A number of published decisions cite *Roybal* positively (see, e.g., *Rice v. Crow, supra,* 81 Cal.App.4th at p. 739 ["*Roybal* presented a straightforward and faithful application of well-established res judicata principles."]; *Torrey Pines Bank v. Superior Court* (1989) 216 Cal.App.3d 813, 820), and the Kelayejians point to no decision criticizing it.

The Kelayejians also attack *Roybal* as not supported by the authorities it cites. They note *Roybal* concluded consideration *was* required if a plaintiff dismissed one, but not all, joint tortfeasors. According to the Kelayejians, the *Roybal* court supported its conclusion by citing a number of cases, which the Kelayejians claim the *Roybal* court mischaracterized as involving joint tortfeasors: *Kronkright v. Gardner* (1973) 31 Cal.App.3d 214; *Markwell v. Swift & Co.* (1954) 126 Cal.App.2d 245, disapproved in *Stewart v. Cox* (1961) 55 Cal.2d 857, 861; *Hildebrand v. Delta Lumber & Box Co.* (1944) 67 Cal.App.2d 88; and *Key v. Caldwell* (1940) 39 Cal.App.2d 698.

The Kelayejians' quarrel with *Roybal's* authorities is unavailing for several reasons. First, *Roybal's* discussion that consideration is required when dismissing only one joint tortfeasor was dicta, neither necessary to *Roybal's* decision nor to our decision here since Allstate is not a joint tortfeasor. (In fact, Allstate is not a tortfeasor at all, whether jointly or singly, because the Kelayejians' sole cause of action is for breach of contract.) Second, the Kelayejian's quarrel with *Roybal* ignores that later courts have favorably cited *Roybal* for the proposition that a voluntary dismissal with prejudice does not require consideration for it to be a retraxit. And, finally, the Kelayejians misread *Roybal's* authorities, for a number of them did involve tortfeasors. (See *Markwell v. Swift & Co., supra,* 126 Cal.App.2d at pp. 252-253 [release of one tortfeasor was a retraxit if accompanied by consideration] disapproved in *Stewart v. Cox, supra,* 55 Cal.2d at p. 861; *Hildebrand v. Delta Lumber & Box Co., supra,* 67 Cal.App.2d at pp. 90-91

[noted common law rule that consideration required for retraxit for one, but not other, tortfeasors]; *Key v. Caldwell, supra,* 39 Cal.App.2d at pp. 701-702 [no retraxit among tortfeasors unless consideration received].)

The Kelayejians contend that *Roybal* is obsolete because the Legislature has since amended section 473, a statute that allows hapless parties to move to set aside default judgments. In *Roybal*, the appellant tried to use section 473 to set aside its dismissal of its municipal court complaint. According to the Kelayejians, the version of section 473 then in effect was a stingy statute unlikely to provide the appellants any relief. Since then, section 473 has been expanded to apply more generously. According to the Kelayejians, as section 473 changed, *Roybal* was left behind. But the Kelayejians' assertion is unpersuasive because *Roybal's* significance is not its discussion of section 473. Its significance is its holding that a dismissal with prejudice is res judicata even without consideration. Nothing in later amendments to section 473 relate to that holding.

Finally, the Kelayejians contend application of res judicata rests in our discretion, and ask that we exercise it to allow them to sue Allstate despite their having dismissed Allstate with prejudice eight years ago. We decline to do so. Section 340.9's purpose was met here. The Legislature enacted the statute to provide relief to a policyholder who missed a deadline for suing his insurer over property damage from the Northridge earthquake. The Kelayejians filed a timely lawsuit in 1996, an action in which counsel represented them. The Kelayejians raise no evidence that Allstate obtained the dismissal of that first lawsuit through fraud, duress, or bad faith. If the Kelayejians have any quarrel with anyone, it is with their attorney who, they allege, dismissed their complaint without their knowledge. But that is no reason to upend Allstate's repose.

DISCUSSION

The judgment is affirmed. Respondent to recover its costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.